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IN THE COURT OF APPEALS OF INDIANA

CHRISTINE DAVIES,)
Appellant-Plaintiff,)
vs.) No. 77A01-0606-CV-232
LINDA LAND, Personal Representative of the Unsupervised Estate of GEORGE T. LAND, Appellee-Defendant.))))

APPEAL FROM THE SULLIVAN SUPERIOR COURT The Honorable Thomas E. Johnson, Judge Cause No. 77D01-0407-CT-259

MAY 17, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

SHARPNACK, Judge

Christine Davies appeals the judgment in her personal injury claim against Linda Land, personal representative of the Unsupervised Estate of George Land. Davies raises two issues, which we revise and restate as:

- I. Whether the trial court erred when it instructed the jury regarding Ind. Code § 9-21-8-24; and
- II. Whether the evidence is sufficient to support the jury's verdict.We affirm.

The relevant facts follow. On August 19, 2002, between 9:30 a.m. and 10:00 a.m., George Land ("Land") was driving on Interstate 70 and entered the exit ramp leading to southbound U.S. 41. A yield sign controls traffic merging onto southbound U.S. 41. U.S. 41 has three southbound lanes at the location where the exit ramp merges onto U.S. 41.

Land was planning on making a right hand turn to merge onto southbound U.S. 41. Land was directly behind Davies, who was also intending to merge onto southbound U.S. 41. Davies was on her way to work, which required her to make a left hand turn at the next stoplight south of the exit ramp. The exit ramp had "quite a bit of traffic," which was starting and stopping. Transcript at 189. Davies "was coming into the merge lane and she stopped." Id. Davies's vehicle was the next to enter onto U.S. 41. Land stopped, and Davies began moving forward. Land saw that there was enough room to merge into the right lane and started to move forward. Land turned his head to check if he still had room to merge, Davies stopped her vehicle, and Land struck Davies.

Davies experienced a sharp pain up the back of her neck two hours after the accident. That evening, Davies went to Union Hospital, and Dr. Johnson diagnosed Davies as having whiplash. Dr. Johnson told Davies that if she did not feel better, she could go to a family doctor. When Davies told Dr. Johnson that she did not have a family doctor, Dr. Johnson offered Davies his services.

Davies called Dr. Johnson to schedule a follow up visit. Davies stayed home from work on August 28th, 29th, and 30th per Dr. Johnson's recommendation. On August 29, 2002, Davies went to see Dr. Johnson, and Dr. Johnson prescribed Darvocet, Flexeril, and Vioxx, as well as physical therapy. The physical therapy provided temporary relief.

On September 12, 2002, Dr. Johnson referred Davies to Dr. Bergeron. Davies saw Dr. Bergeron who diagnosed Davies with cervical whiplash. Dr. Bergeron ordered a new round of physical therapy. In October 2002, Davies told her therapist that she was doing "okay" and had decided to end the physical therapy. <u>Id.</u> at 139. Davies last saw Dr. Bergeron on January 10, 2003. Dr. Bergeron rescheduled Davies for an appointment on April 11, 2003, but Davies cancelled that appointment.

On March 25, 2003, Davies went to see Dr. Johnson again. Dr. Johnson referred Davies to Dr. Irving Haber. On March 31, 2003, Davies saw Dr. Haber and engaged in physical therapy. Davies complained of a loss of sensation in her left upper arm. Dr. Haber ordered six physical therapy sessions, which Davies completed. On May 1, 2003, Davies followed up with Dr. Haber and indicated that the physical therapy had "helped some," and complained about pain in her neck and shoulder region. Id. at 86. Dr. Haber

diagnosed Davies with "[c]ervical sprain/strain," "[c]ervical/superior trap contractures," and "myalgia," which resulted in numbness in her left arm. <u>Id.</u> at 212-213. Dr. Haber indicated that the ulnar nerve could be causing some of Davies's problems. In 2005, Davies went to see Dr. Scott McVey, a chiropractor.

On July 29, 2004, Davies filed a complaint against Land.¹ At trial, Land proposed the following jury instruction:

At the time of the occurrence being considered in this case, Indiana statute provided as follows:

A person may not:

(1) slow down or stop a vehicle; . . . unless the movement can be made with reasonable safety.

If you find from a preponderance of the evidence that any party violated these statutes on the occasion in question and the violation was without excuse or justification, such conduct would constitute fault to be assessed against that party.

Appellant's Appendix at 27. The trial court gave final Instruction No. 12, which stated:

At the time of the occurrence being considered in this case, Indiana statutes provided as follows:

Indiana Code 9-21-5-4: The driver of each vehicle shall drive at an appropriate reduced as speed as follows:

- (1) When approaching and crossing an intersection.
- (2) When special hazard exists with respect to other traffic or by reason of weather or highway conditions.

¹ A copy of the complaint is not provided in the record.

Indiana Code 9-21-8-14: A person who drives a motor vehicle may not follow another vehicle more closely than is reasonable and prudent, having due regard for the speed of both vehicles, the time interval between vehicles, and the condition of the highway.

Indiana Code 9-21-8-24: A person may not:

(1) Slow down or stop a vehicle; unless the movement can be made with reasonable safety.

Indiana Code 9-21-8-33: A person who drives a vehicle approaching a yield sign shall slow down to a speed reasonable for the existing conditions or stop if necessary.

If you find from a preponderance of the evidence that either party violated any or all of these statutes on the occasion in question and the violation was without excuse or justification, such conduct would constitute negligence to be assessed against that party.

<u>Id.</u> at 28. The jury found that Davies's damages were \$16,000 and assessed fifty-one percent of the fault to Land and forty-nine percent of the fault to Davies.

On June 2, 2006, Davies filed a notice of appeal. On August 30, 2006, Davies filed a motion to certify statement of evidence. Davies argued that upon reviewing the transcript, she "determined that there appeared to be no record of [Davies's] objection to a proposed Final Instruction submitted by [Land]." Id. Davies argued that her counsel contacted the court reporter that investigated the matter and subsequently informed Davies's counsel that no record was maintained of the discussions and objections that occurred in open court. Davies attached a verified statement of evidence to her motion. Land filed a response to Davies's statement of evidence and stated that Davies objected to Land's proposed instruction and that Land withdrew the instruction from the trial

court. Davies filed a rebuttal to Land's verified statement. The trial court denied Davies's motion to certify her statement of evidence.

Ī.

The first issue is whether the trial court erred when it instructed the jury regarding Ind. Code § 9-21-8-24. The trial court's Instruction No. 12 stated, in part:

At the time of the occurrence being considered in this case, Indiana statutes provided as follows:

* * * * *

Indiana Code 9-21-8-24: A person may not:

(1) Slow down or stop a vehicle; unless the movement can be made with reasonable safety.

* * * * *

If you find from a preponderance of the evidence that either party violated any or all of these statutes on the occasion in question and the violation was without excuse or justification, such conduct would constitute negligence to be assessed against that party.

Appellant's Appendix at 28.

Davies argues that there was no evidence in the record supporting the instruction to the extent that it addresses Ind. Code § 9-21-8-24.² Land argues that Davies waived

A person may not:

² Ind. Code § 9-21-8-24 provides:

⁽¹⁾ slow down or stop a vehicle;

⁽²⁾ turn a vehicle from a direct course upon a highway; or

⁽³⁾ change from one (1) traffic lane to another;

this argument because she failed to object to Instruction No. 12. Even assuming, without deciding, that Davies did not waive this argument, we conclude that the trial court did not abuse its discretion by giving Instruction No. 12.

The giving of jury instructions lies within the trial court's sound discretion, and we review the trial court's refusal to give a tendered instruction for an abuse of that discretion. Elmer Buchta Trucking, Inc. v. Stanley, 744 N.E.2d 939, 944 (Ind. 2001). The purpose of an instruction is to inform the jury of the law applicable to the facts without misleading the jury and to enable it to comprehend the case clearly and arrive at a just, fair, and correct verdict. Centennial Mortgage, Inc. v. Blumenfeld, 745 N.E.2d 268, 278 (Ind. Ct. App. 2001). In determining whether it is error to refuse a tendered instruction, we consider: (1) whether the instruction correctly states the law; (2) whether there is evidence in the record supporting the instruction; and (3) whether the substance of the instruction is covered by other instructions. Elmer Buchta Trucking, 744 N.E.2d at 944. Moreover, a party seeking a new trial on the basis of an improper jury instruction must show "a reasonable probability that substantial rights of the complaining party have been adversely affected." Id.

unless the movement can be made with reasonable safety. Before making a movement described in this section, a person shall give a clearly audible signal by sounding the horn if any pedestrian may be affected by the movement and give an appropriate stop or turn signal in the manner provided in sections 27 through 28 of this chapter if any other vehicle may be affected by the movement.

"In reviewing a claim that evidence was insufficient to support the giving of an instruction, we may look only to the evidence most favorable to the appellee and any reasonable inferences to be drawn therefrom." <u>Turner v. Davis</u>, 699 N.E.2d 1217, 1221 (Ind. Ct. App. 1998), <u>reh'g denied</u>, <u>trans. denied</u>. "If there is any evidence which supports the instruction, it was properly given." <u>Id.</u>

Although Davies argues that no evidence supported giving the portion of the Instruction No. 12 that concerns Ind. Code § 9-21-8-24, Land argues that the record contains evidence to support Instruction No. 12. Specifically, Land argues that the evidence indicates "that the accident occurred **after** Davies had stopped for the yield sign, had proceeded on and then unexpectedly and unexplainably stopped again." Appellee's Brief at 23-24. Land argues that his testimony "establishes that [Davies] had clear room to merge onto the highway and proceeded forward, but for some unexplained reason stopped again" and "[t]his is the very type of situation to which I.C. 9-21-8-24 is applicable." <u>Id.</u> at 23.

The record reveals the following exchange during the direct examination of George Land:

- Q. And when we say the merge lane, you were going to turn right?
- A. Yes.
- Q. Or south on US 41?
- A. South on 41, yes.
- Q. So you were behind her in that right-hand turn lane?

- A. Yes.
- Q. After starting stopping and stopping for some time, she was next in line apparently to merge?
- A. She was next in line to merge, yes.
- Q. And as she had started, you assumed she was going to go ahead and go?
- A. I assumed she was going because there was room. The right-hand merge lane was open, so that's why I proceeded also.
- Q. But you turned to look to see if there was room?
- A. Yeah, just to double-check to make sure that I had room. I knew she had room.
- Q. And when you turned to look, she had apparently stopped?
- A. She stopped.
- Q. And that's when you struck her?
- A. That's when I hit her.

Transcript at 190-191. The following exchange on cross-examination of Land:

- Q. Did Mrs. Davies have a clear lane in front of her to merge in?
- A. She had a clear land [sic] for the right-hand merge, yes.
- Q. Was there any reason for her to stop that you could see?
- A. Not that I could see. That's why I hit her.

<u>Id.</u> at 198-199. Construing the evidence most favorable to Land and any reasonable inferences to be drawn therefrom, we conclude that the evidence supports the instruction

and that the trial court did not err by giving the instruction. <u>See, e.g.</u>, <u>Turner</u>, 699 N.E.2d at 1222 (holding that the trial court did not err by giving an instruction because there was some evidence supporting the instruction).

II.

The next issue is whether the evidence is sufficient to support the jury's verdict. Our standard of review of sufficiency of the evidence is the same in civil cases as in criminal cases. <u>Indian Trucking v. Harber</u>, 752 N.E.2d 168, 172 (Ind. Ct. App. 2001). We consider only the evidence most favorable to the verdict and the reasonable inferences to be drawn therefrom. <u>Id.</u> We will not reweigh the evidence or judge the credibility of the witnesses. <u>Id.</u> The verdict will be affirmed unless we conclude that it is against the great weight of the evidence. <u>Id.</u> Davies argues that the evidence does not support the verdict that: (A) Davies was 49% at fault; and (B) the damages total \$16,000. We will address each argument separately.

A. Fault

We have previously concluded that Land presented some evidence that Davies stopped after stopping at the yield sign. See supra Issue I. "Fault apportionment under the Indiana Comparative Fault Act is uniquely a question of fact to be decided by the jury." McKinney v. Pub. Serv. Co. of Ind., Inc., 597 N.E.2d 1001, 1008 (Ind. Ct. App. 1992), trans. denied. "[A]t some point the apportionment of fault may become a question of law for the court. But that point is reached only when there is no dispute in the evidence and the factfinder is able to come to only one logical conclusion." Robbins v.

McCarthy, 581 N.E.2d 929, 934 (Ind. Ct. App. 1991), reh'g denied, trans. denied. Because we have concluded that there is a dispute in the evidence, the apportionment of fault should be left for the jury. See, e.g., City of Crawfordsville v. Price, 778 N.E.2d 459, 463 (Ind. Ct. App. 2002) (holding that the apportionment of fault should be left to the factfinder because different inferences could be drawn from the facts); Robbins, 581 N.E.2d at 934-935 (holding that the apportionment of fault should be left for the jury).

B. <u>Damages</u>

Davies argues that the jury's determination of damages in the amount of \$16,000 is contrary to law. Specifically, Davies argues that the uncontested damages total \$31,556.98, which consists of \$29,397.54 in medical expenses and lost wages of \$2,169.44. Davies argues that Land introduced no evidence that the medical care was for injuries that were unrelated to the collision. Land argues that the medical expenses were disputed at trial because the majority of Davies's medical bills were incurred years after Davies recovered. Land also argues that Davies's pre-accident degenerative condition was likely to advance.

The record reveals that in October 2002, Davies cancelled an appointment with Dr. Bergeron and said that she was "doin' okay." Transcript at 139. Dr. Bergeron's report dated January 10, 2003, indicated that Davies had full cervical range of motion without any pain. Davies's medical bills incurred from the date of the accident to January 10, 2003, totaled seven thousand dollars. Davies did not see Dr. Haber until April 2003, and Dr. Haber's bills total \$19,282. Dr. Haber testified that there are various

"non-trauma causes" of ulnar nerve compression and sometimes ulnar nerve compression

"just happen[s]." <u>Id.</u> at 260. Davies did not dispute a diagnosis in June 2000 that she had

"chronic degenerative/arthritic changes" in the "upper and mid thoracic spine associated

with kyphosis" and had mild degenerative arthritic changes demonstrated in the shoulders

and hips. Id. at 156. Dr. McVey testified that the chronic degenerative changes would

only stay the same or get worse and could cause pain. "It was the duty of the trier of fact

to weigh this conflicting evidence and determine the credibility of the witnesses in

finding damages." Skorich v. Kochan, 173 Ind. App. 413, 418, 363 N.E.2d 1081, 1084

(1977). We cannot say that the facts are undisputed and lead to one conclusion that is

contrary to that reached by the jury.

For the foregoing reasons, we affirm the judgment.

Affirmed.

SULLIVAN, J. and CRONE, J. concur

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